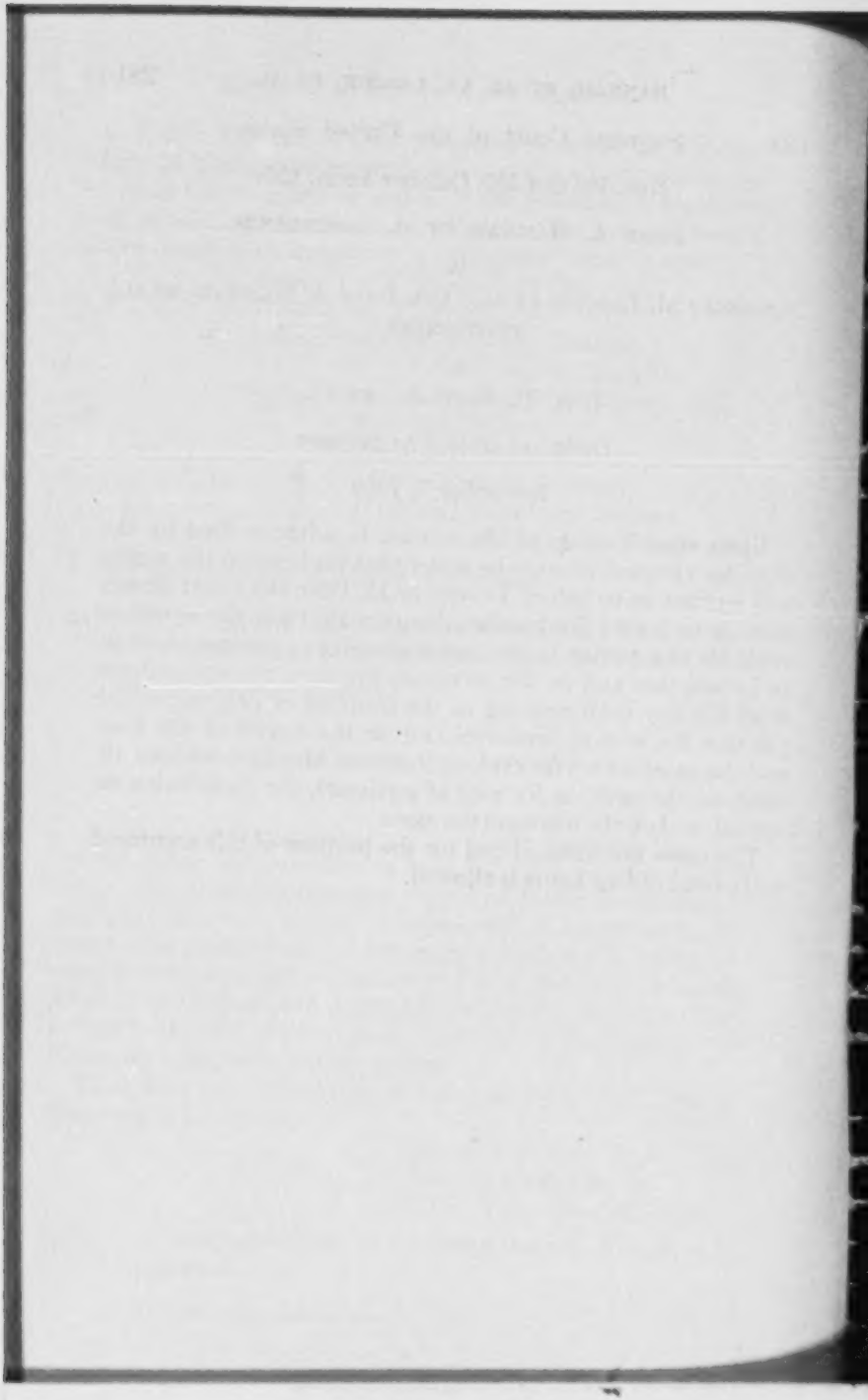

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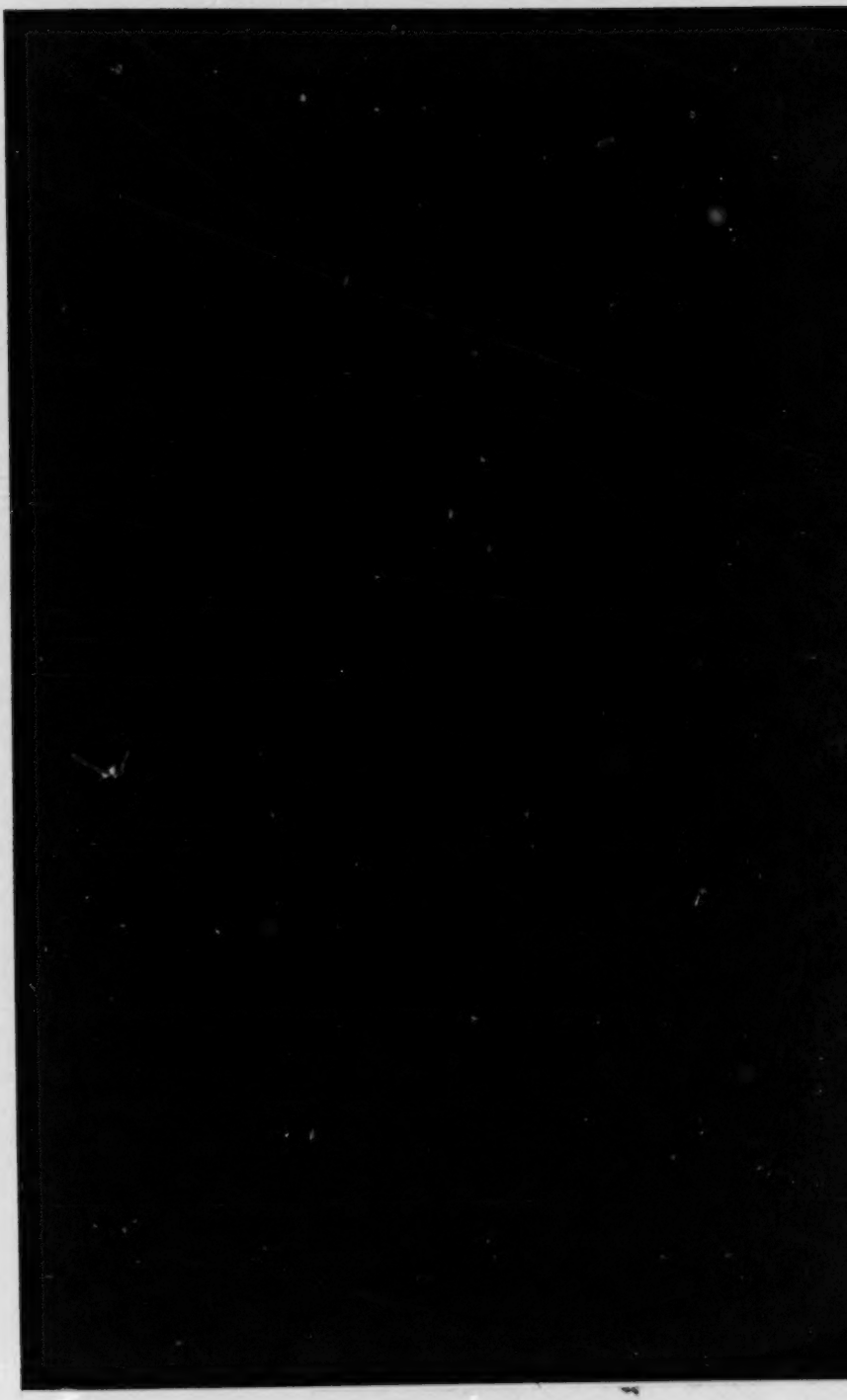

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions and rules involved	2
Question presented	7
Statement	8
The question is substantial	10
Conclusion	13
Appendix A	14
Appendix B	48
Appendix C	50

CITATIONS

Cases:	
Bowman Dairy Company v. *United States*, 341 U.S. 214	12
Greene v. *McElroy*, 360 U.S. 474	11
Groban, In re, 352 U.S. 330	13
McGrain v. *Daugherty*, 273 U.S. 135	13
Norwegian Nitrogen Products Company v. *United States*, 288 U.S. 294	13
Palermo v. *United States*, 360 U.S. 343	12
Roviaro v. *United States*, 353 U.S. 53	12
Scher v. *United States*, 305 U.S. 251	12
Constitution, statutes, and rules:	
U.S. Constitution:	
Article I	9
Fourteenth Amendment	9
Fifteenth Amendment	9
Section (2)	9

Constitution, statutes, and rules—Continued

	Page
Civil Rights Act of 1957 (P.L. 85–315, 71 Stat. 634, 42 U.S.C. 1975 *et seq.*)	2, 7, 8, 9, 10, 11
1975	2
1975(a)	2
1975a(a)	2
1975a(b)	3
1975a(c)	3
1975a(d)	3
1975a(e)	3
1975a(f)	3
1975a(g)	3
1975a(h)	4
1975a(i)	4
1975a(j)	4
1975a(k)	5
1975c(a)	5
1975c(a)(1)	5, 8
1975c(a)(2)	5
1975c(a)(3)	5
1975c(b)	5, 10
1975c(c)	6, 10
1975d	6
1975d(f)	6
P.L. 86–383, 73 Stat. 724	10
18 U.S.C. 3500	12
28 U.S.C.:	
1253	10
1331	8
1332	8
2282	9

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Constitution, statutes, and rules—Continued
Civil Rights Commission Rules of Procedure adopted July 1, 1958: Page
Rule 3(f) 6
Rule 3(g) 7
Rule 3(h) 7
Rule 3(i) 7
Rule 3(j) 7
Federal Rules of Criminal Procedure, Rules 16 and 17 12
Miscellaneous:
103 Cong. Rec.:
8491 12
11503–11505 12

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. —

JOHN A. HANNAH, ET AL., APPELLANTS

v.

MARGARET M. LARCHE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Louisiana, which is not yet reported, is set forth in Appendix A, *infra*, pp. 14–47. A prior opinion of the District Court, granting appellees' application for a temporary restraining order, also unreported, is set forth in Appendix C, *infra*, pp. 50–68.

JURISDICTION

This action was instituted by appellees in the District Court for the Western District of Louisiana under 28 U.S.C. 1331 and 1332 to enjoin the conduct of a hearing scheduled by the Commission on Civil Rights and to declare unconstitutional

and unenforceable that portion of the Civil Rights Act of 1957 (42 U.S.C. 1975) which established the Commission.

On October 7, 1959, a three-judge court, convened pursuant to 28 U.S.C. 2282, filed an opinion holding that the Civil Rights Act was constitutional, but deciding that certain rules and procedures adopted by the Commission for the conduct of its investigations were unauthorized by the statute. On November 9, 1959, the court entered an order enjoining appellants from holding hearings in Louisiana under such rules and procedures. A notice of appeal to this Court was filed on November 12, 1959. The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. 1253.

STATUTORY PROVISIONS AND RULES INVOLVED

The Civil Rights Act of 1957 (P.L. 85–315, 71 Stat. 634, 42 U.S.C. 1975), as it appears in the United States Code, provides:

> § 1975. COMMISSION ON CIVIL RIGHTS.
>
> (a) *Establishment.*
>
> There is created in the executive branch of the Government a Commission on Civil Rights (hereinafter called the "Commission").
>
> * * * * *
>
> § 1975a. RULES OF PROCEDURE.
>
> (a) *Opening statement.*
>
> The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

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(b) *Copy of rules.*

A copy of the Commission's rules shall be made available to the witness before the Commission.

(c) *Attendance of counsel.*

Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(d) *Censure and exclusion of counsel.*

The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings.

(e) *Defamatory, degrading, or incriminating evidence.*

If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses.

(f) *Requests for additional witnesses.*

Except as provided in this section and section 1975(f) of this title, the Chairman shall receive and the Commission shall dispose of requests to subpena additional witnesses.

(g) *Release of evidence taken in executive session.*

No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the

consent of the Commission evidence or testimony taken in executive session shall be fined not more than $1,000, or imprisoned for not more than one year.

(h) *Submission of written statements.*

In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

(i) *Transcripts.*

Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the Commission.

(j) *Witness fees.*

A witness attending any session of the Commission shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $12 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of a subpena issued on behalf of the Commission or any subcommittee thereof.

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(k) *Restriction on issuance of subpena.*

The Commission shall not issue any subpena for the attendance and testimony of witnesses or for the production of written or other matter which would require the presence of the party subpenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business.

* * * * *

§ 1975c. DUTIES; REPORTS; TERMINATION.

(a) The Commission shall—

(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;

(2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and

(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from September 9, 1957.

(c) Sixty days after the submission of its final report and recommendations the Commission shall cease to exist.

§ 1975d. POWERS.

* * * * *

(f) *Hearings; issuance of subpenas.*

The Commission, or on the authorization of the Commission any subcommittee of two or more members, at least one of whom shall be of each major political party, may, for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized subcommittee may deem advisable. Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with the rules of the Commission as contained in section 1975a (j) and (k) of this title, over the signature of the Chairman of the Commission or of such subcommittee, and may be served by any person designated by such Chairman.

The Rules of Procedure, adopted on July 1, 1958, by the Commission on Civil Rights, provide:

3. * * *

(f) An accurate transcript shall be made of the testimony of all witnesses in all hearings, either public or executive sessions, of the Commission or of any subcommittee thereof. Each witness shall have the right to inspect the record of his own testimony. A transcript copy of his testimony may be purchased by a witness pursuant to Rule 2(i) above. Transcript copies of public sessions may be obtained by the public upon payment of the cost thereof.

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(g) Any witness desiring to read a prepared statement in a hearing shall file a copy with the Commission or subcommittee 24 hours in advance. The Commission or subcommittee shall decide whether to permit the reading of such statement.

(h) The Commission or subcommittee shall decide whether written statements or documents submitted to it shall be placed in the record of the hearing.

(i) Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel.

(j) If the Commission pursuant to Rule 2(e), or any subcommittee thereof, determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall advise such person that such evidence has been given and it shall afford such person an opportunity to read the pertinent testimony and to appear as a voluntary witness or to file a sworn statement in his behalf.

QUESTION PRESENTED

The Civil Rights Act of 1957 directs the Commission on Civil Rights to "investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin * * *."

The question presented is whether the District Court erred in enjoining the Commission from holding a scheduled hearing under the Act, where it appeared that (a) the plaintiffs are voting registrars who were subpoenaed to appear as witnesses at the

hearing; (b) the Commission, considering all complaints submitted to it as confidential, denied plaintiffs' request, in advance of the hearing, for the names of the complainants and the contents of their allegations; and (c) the Commission's Rules of Procedure governing hearings provide that interrogation of witnesses shall be conducted only by members of the Commission or its staff.

STATEMENT

On July 10, 1959, appellees, registrars of voters for certain parishes in Louisiana, who had been subpoenaed to appear at a hearing of the Commission on Civil Rights, and to bring to the hearing various voting and registration records within their custody and control, filed a complaint under 28 U.S.C. 1331 and 1332 in the District Court for the Western District of Louisiana against appellants, the members of the Commission on Civil Rights, to enjoin a hearing scheduled to be held in Shreveport, Louisiana, on July 13, 1959. This hearing had been scheduled by the Commission pursuant to the authority contained in section 104(a)(1) of the Civil Rights Act of 1957, 42 U.S.C. 1975c(a)(1), and had as its principal purpose the investigation of written allegations that certain citizens were being deprived of their right to vote on account of race or color. In advance of the hearing, appellees requested the Commission to furnish (a) the names of the persons who had made these allegations, and (b) copies of the affidavits which had been submitted by the complainants. This request was denied.

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Appellees contended that the Act creating the Commission did not constitute "appropriate legislation" within the meaning of Section (2) of the Fifteenth Amendment to the Constitution, and that the Commission was acting illegally in refusing to advise them of the nature of the allegations pursuant to which the hearing had been scheduled and in refusing to allow them to confront and cross-examine the persons making such allegations. The prayer for relief sought a temporary restraining order and a preliminary and a permanent injunction.

The District Court (Dawkins, J.) issued a temporary restraining order. Thereafter, inasmuch as the complaint sought an injunction restraining the operation of an Act of Congress as in violation of the Constitution, a three-judge court was convened pursuant to 28 U.S.C. 2282. After a hearing, the court held the Civil Rights Act of 1957 to be an appropriate exercise of legislative power under the Fourteenth and Fifteenth Amendments and under Article I of the Constitution. However, the court held, with Circuit Judge Wisdom dissenting, that the Commission's rules and procedures were not authorized by Congress and invalid. On November 9, 1959, the court entered an order enjoining the Commission from holding any hearings in the Western District of Louisiana in which the registrars, "accused of depriving others of the right to vote, would be denied the right of apprisal, confrontation and cross examination."[1]

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[1] The court's order (Appendix B, *infra*, pp. 48–49) does not specify whether the injunction is permanent or interlocutory. Judge Dawkins, in issuing the temporary restraining order, en-

THE QUESTION IS SUBSTANTIAL

1. One of the principal functions which Congress, in the Civil Rights Act of 1957, assigned to the Commission on Civil Rights is the investigation of allegations that certain citizens of the United States are being deprived of the right to vote because of their color, race, religion, or national origin. Congress expressly prescribed rules of procedure to be followed by the Commission at its hearings, and the Commission has also promulgated various implementing rules. (*Supra,* pp. 6–7.) The decision below, in holding basic provisions of the Commission's rules and procedures to be unauthorized and invalid, has brought to a halt the Commission's hearings in this important area. The Government believes that the decision below is manifestly erroneous and should promptly be set aside in order that the Commission, a body of limited life,[2] may proceed to carry out the mandate of Congress.

2. Although, strictly speaking, appellee registrars were merely subpoenaed to appear at the Commission's scheduled hearing and were "accused" of

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tered a rule to show cause why a preliminary injunction should not be issued. Argument was thereupon made to the three-judge court. The opinion of the three-judge court, however, decides the merits of the case. For this reason, and because the order of the three-judge court is unrestricted in terms and disposes of all issues, it would appear that the order is a permanent injunction. Whether the order is final or interlocutory, however, it is appealable to this Court under 28 U.S.C. 1253.

[2] By virtue of subsections (b) and (c) of section 104 of the Civil Rights Act, 42 U.S.C. 1975c (b) and (c), the Commission was to expire not later than November 8, 1959. The life of the Commission was extended for a further two-year period on September 28, 1959. P.L. 86–383, 73 Stat. 724.

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nothing, we may assume *arguendo,* as the District Court did, that the allegations of voting rights violations being investigated by the Commission concerned the appellees. It does not follow, however, that the hearing here may properly be analogized to a judicial determination of guilt or innocence in a criminal case. The District Court itself recognized that the Civil Rights Commission does not make adjudications. (App. A, *infra,* p. 16, fn. 3.) The Commission's function is limited to making a report of its findings, activities, and recommendations to Congress and the President. It has no authority to impose sanctions, to indict, to punish, or to deprive any person of life, liberty, or property. In this regard it functions solely as an investigative arm of the legislative and executive branches of government. Appellees are witnesses, not defendants; and the District Court plainly exceeded its authority in prohibiting the Commission from securing their testimony, and that of other witnesses at the scheduled hearing.

3. As demonstrated by Judge Wisdom in his dissenting opinion (App. A, *infra,* pp. 36–41), the rationale of *Greene* v. *McElroy,* 360 U.S. 474, is wholly inapplicable here because Congress, after full consideration, rejected the proposal that witnesses before the Commission should be accorded the traditional safeguards provided for defendants in criminal trials, *i.e.,* notice, confrontation, and cross-examination. Instead, as the legislative history detailed in Judge Wisdom's opinion shows, Congress specifically incorporated into the Civil Rights Act of 1957 the so-called "fair play" rules applicable

to proceedings conducted by committees of the House of Representatives. In addition to the materials cited by Judge Wisdom, we may note here that in the House debates on this bill Representative Celler, Chairman of the Judiciary Committee and a sponsor of the bill, asserted that the "fair play" rules afforded sufficient protection to witnesses (103 Cong. Rec. 8491). Senator Talmadge, on the other hand, levelled the same criticisms against those rules as are urged by appellees. He stated (103 Cong. Rec. 11503–11505):

> No provision is made for persons adversely affected by testimony taken by the Commission to be present when they are accused or later to confront and cross-examine their accusers.

4. There is no authority to support the contention made by appellees below, which the District Court found it unnecessary to reach, that the Constitution requires the Commission to furnish subpoenaed witnesses with advance notice of the identity of complainants and the contents of their allegations, and to provide witnesses the same opportunity for confrontation and cross-examination as is afforded defendants in criminal trials.[3] Congressional committees, administrative agencies, and executive commissions have

[3] Even in a federal criminal case the defendant has only a limited right of pre-trial discovery (Rules 16 and 17, Federal Rules of Criminal Procedure; cf. *Bowman Dairy Company* v. *United States*, 341 U.S. 214, 221), and is not normally entitled to pre-trial disclosure of the identity of informants and to obtain statements given by them to the Government. 18 U.S.C. 3500; *Palermo* v. *United States*, 360 U.S. 343; cf. *Scher* v. *United States*, 305 U.S. 251, 254; *Roviaro* v. *United States*, 353 U.S. 53, 59–61.

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customarily proceeded in their inquiries without being subject to such restrictions. The reason lies in the difference between adjudication and investigation. Thus, in *Norwegian Nitrogen Products Company* v. *United States,* 288 U.S. 294, 318, the Court, speaking through Mr. Justice Cardozo, stated:

> * * * the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other.

Cf. *McGrain* v. *Daugherty,* 273 U.S. 135; *In re Groban,* 352 U.S. 330.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted and the case set down for an early hearing.[4]

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
JOSEPH M. F. RYAN, JR.,
Acting Assistant Attorney General.
HAROLD H. GREENE,
DAVID RUBIN,
Attorneys.

NOVEMBER 1959.

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[4] The Government is filing, with this Jurisdictional Statement, a motion to advance the Court's consideration of the appeal.

532336—59——2

APPENDIX A

In the United States District Court for the Western District of Louisiana, Shreveport Division

[Filed October 7, 1959]

Civil Action No. 7479

MRS. MARGARET M. LARCHE, ET AL., IN THEIR INDIVIDUAL CAPACITIES AND AS REGISTRARS OF VOTERS IN AND FOR THEIR PARISHES OF THE STATE OF LOUISIANA

vs.

JOHN A. HANNAH, ET AL., INDIVIDUALLY AND AS MEMBERS OF THE COMMISSION ON CIVIL RIGHTS

THREE-JUDGE COURT:

Judge JOHN MINOR WISDOM, *Circuit Judge;* Judge BEN C. DAWKINS, Jr., *Chief Judge;* Judge EDWIN F. HUNTER, Jr., *District Judge.*

HUNTER, Judge.

This case originated in the Shreveport Division of the Western District of Louisiana upon the filing of a complaint on July 10, 1959. Plaintiffs are registrars of voters in and for certain parishes in Louisiana.[1] The Commission on Civil Rights is a temporary agency of the United States, created by the Civil Rights Act of 1957, under Public Law 85–315, 85th Congress, U.S.C.A. 42:1975, et seq. The Com-

[1] Hereinafter referred to as "Registrars".

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mission scheduled a hearing for July 13, 1959, in Shreveport, Louisiana for the purpose of investigating allegations in writing (under oath or affirmation) that certain citizens were being deprived of their right to vote on account of race or color.[2] These allegations accuse the registrars, through their official acts, of having caused such deprivation, and summoned them to appear before the Commission. The subpoenas also required the registrars to produce for inspection various voting and registration records within their custody and control.

The suit is against the Commission and its members. Its declared object is to stay the effectiveness of the Commission subpoenas and subpoenas duces tecum, and to restrain and enjoin the conduct of the proposed hearing. The registrars insist they are entitled to this relief because the Commission is seeking to hold such hearing pursuant to rules of procedure which are ultra vires, and which deny to them traditional procedural safeguards. Moreover, the registrars assert that the rules of procedure adopted by the Commission violate their fundamental constitutional rights; and that the Act in its entirety is unconsti-

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[2] Under Section 104(a) of that Act the Commission is empowered and directed to: "(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based; * * *"

The Act also empowers the Commission, or any authorized subcommittee thereof, to hold such public hearings and act at such times and places as the Commission may deem advisable. Said Act also empowers the Commission to require the attendance and testimony of witnesses or the production of written or other matters.

tutional because it constitutes an unconstitutional delegation of power.[3]

Detailing their complaints, supported by sworn affidavits, the registrars allege that they were served with subpoenas and subpoenas duces tecum issued by the Chairman of the Commission, commanding them to appear and testify before the Commission on July 13, 1959; that they have not been informed of the nature of the complaints against them, nor have they been assured that they will be confronted with the complaining witnesses; that the Commission repeatedly has informed the Attorney General of Louisiana that it would not, under any circumstances, furnish plaintiffs with, or permit them to examine, the written complaints filed against them, nor would it divulge the name or names of the secret complainants; that the rules under which the hearing is to be conducted specifically deny to registrars the right to cross-examine their accusers.[4]

On July 10, 1959, the case was heard by the Honorable Ben C. Dawkins, Jr., Chief Judge of the Western District of Louisiana. The matter was extensively argued and briefed. On July 12th Judge Dawkins granted a temporary restraining order and issued a rule on the Commission and its members to show cause why an interlocutory injunction should not issue. Judge Dawkins, in issuing the temporary re-

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[3] Registrars also contend that the procedural provisions of the Administrative Procedure Act should be applied. We cannot agree. The A.P.A. prescribes in section 7 (5 U.S.C. 1006), specific hearing procedures with respect to two processes; in section 4 (5 U.S.C. 1003) with respect to "rule making", and in section 5 (5 U.S.C. 1004) with respect to "adjudications." The Act contains no hearing requirements except where rule making or adjudications are involved. The Civil Rights Commission is performing neither function here.

[4] The truth of these facts is not contested.

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straining order, did not intimate any opinion as to the constitutionality of the statute itself.[5] This three-judge court was convened to consider the constitutional attack.

The principal object and purpose of a three-judge federal court is to decide the constitutional validity of the Act of Congress sought to be enjoined. But where other issues are presented, as they are here, they too should be decided. The parties readily agree that this is so and that all issues, both constitutional and non-constitutional, are before this court.[6]

THE CONSTITUTIONALITY OF THE ACT ITSELF

Complainants seek a declaratory judgment to the effect that the Act is unconstitutional because it is not appropriate legislation. Manifestly, this position cannot be sustained.

The Constitution and pertinent decisions of the Supreme Court make clear that Congress may, pursuant to power conferred upon it by Article 1 of the Constitution, legislate to secure the right to vote in federal elections. That power has been found in Article 1, Section 4. *Ex Parte Siebold,* 100 U.S. 371, 383 (1879); *Ex Parte Yarbrough,* 110 U.S. 651, 660 (1884); *United States* v. *Mosley,* 238 U.S. 383 (1915). It has been found in Article 1, Section 8, Clause 18, *Ex Parte Yarbrough, supra,* at page 658. It has been found in Article 1, Section 2, *United States* v. *Classic,* 313 U.S. 299, 316 (1941). And, as the Supreme Court noted in the *Classic* case, *supra,* at page 315:

> * * * since the constitutional command is without restriction or limitation, the right, unlike

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[5] Judge Dawkins' opinion is made a part hereof by reference.

[6] *California Water Supply Co.* v. *Redding,* 304 U.S. 252 (1938); *Davis* v. *Wallace,* 257 U.S. 478, 482 (1922); *Louisville and Nashville RR Co.* v. *Garrett,* 231 U.S. 298, 304 (1913).

those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states.

It is equally clear that Congress may, pursuant to section 2 of the 15th Amendment, legislate to prevent states and their officials from denying qualified persons the right to vote on account of race, color, or previous condition of servitude (*Guinn* v. *U.S.*, 238 U.S. 347 (1915); *In re Wallace*, 170 F. Supp. 63 (1959)). Similarly, Congress may, pursuant to Section 5 of the 14th Amendment, legislate to prevent states and their officials from enacting or enforcing statutes which deny equal protection of the laws.

Since Congress may legislate pursuant to its constitutional powers, and since it may investigate those objects upon which it may legislate,[7] and since it may delegate its investigative function,[8] the issue of the constitutionality of the acts in creating the Commission rests solely on the question of whether the action of Congress was, in fact, an implementation of its constitutional powers. The stated purposes of the act, its fair reading, and its overwhelming legislative history are proof positive that Congress did create the Commission pursuant to its Article 1 power, as well as to its powers under Sections 5 and 2 of the 14th and 15th Amendments,[9] respectively.

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[7] *Watkins* v. *U.S.*, 354 U.S. 178 (1957).

[8] *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501–510 (1943).

[9] (A) From the report of the House of Representatives Judiciary Committee (Report No. 291, 85th Congress, First Session) accompanying the bill which became, in pertinent part, the Civil Rights Act of 1957, it is manifest that Congress was legislating pursuant to its Article 1 power. Thus, that portion of the report designated "General Statement" notes:

"The Provisions of the Bill H.R. 6127 are designed to achieve a more effective enforcement of the rights already guaranteed

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We are mindful of the arguments repeatedly appearing in the registrars' brief to the effect that the power

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by the Constitution and laws of the United States. This is particularly true with regard to the right of franchise in federal matters." (At page 5.)

Similarly, the "General Statement" portion continues at page 6:

"With regard to the proposals involving the right to vote, the Federal Government has placed upon it by article 1, section 4, of the Constitution the authority to regulate the manner of conducting elections and that authority is further supplemented by the 14th and 15th amendments."

There is further evidence that throughout its deliberations Congress was conscious of its Article 1 power. A clear exercise of that power is illustrated by the enactment of the present subsection (b) of section 1971, Title 42. In authorizing the federal government to prevent certain types of conduct by individuals, its terms are carefully limited to federal elections. And, as the House Report, supra, makes clear (at pages 11–13), Congress rooted this provision in its Article 1 power.

Finally, the history of the terms of the Act which prescribe the duties of the Commission reveals that it was created pursuant to the Article 1 power. Section 104(a) directs that the Committee shall:

"(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote *and have that vote counted* * * *" [Emphasis supplied.]

The underscored language was inserted by the House after the bill came out of Committee. Representative Hoffman, favoring the amendment, regarded its inclusion as crucial since Supreme Court had held it to be an integral part of the right to vote in *United States* v. *Classic*, *supra* (103 Cong. Rec. App. 4716). Thus, the Commission was directed to investigate deprivations of an aspect of the right to vote which had been enunciated in a case which involved the Article 1 power of Congress.

(B) *The 14th Amendment.*—In the House debates Congressman Celler referred to the Act (103 Cong. Rec. 16088) as "* * * clear implementation of the 14th and 15th amendments."

granted to Congress to legislate is specifically limited by the Tenth Amendment. On its face the Tenth Amendment recognizes that certain powers are prohibited by the Constitution to the states, and therefore are not reserved to the states. One of these prohibitions is that no state may deny equal protection of its laws (14th Amendment). Another is that no state may deny the right to vote on account of race, color, or previous condition of servitude (15th Amendment). Still

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Similarly, in the words of the House Report, *supra*, at page 6:

"* * * the 14th amendment operates to prevent any State from enacting or enforcing a law which would abridge the privilege and immunity of a United States citizen and denying such a person the equal protection of the laws. *These two amendments expressly authorize Congress to enforce them by legislation.* [Emphasis supplied.]

"* * * the 14th and 15th amendments, both of which expressly confer upon the Congress the power to enforce them by appropriate regulations." (At page 13.)

Above all, the terms of the Act itself which relate to the Commission on Civil Rights demonstrate conclusively that Congress relied in part upon its powers under section 5 of the Fourteenth Amendment. By section 104(a) the Commission is directed to:

"(2) study and collect information concerning legal developments constituting *a denial of equal protection of the laws under the Constitution;* and [emphasis supplied]

"(3) appraise the laws and policies of the Federal Government *with respect to equal protection of the laws* under the Constitution." [Emphasis supplied.]

The inclusion by Congress of the underscored language manifests its reliance upon a concept found only in the 14th Amendment.

(C) *The 15th Amendment.*—For example, the statement of Senator Bush at 103 Congressional Record, 13138: "That is the central purpose of this bill: to give meaning to the 15th amendment of the Constitution of the United States." See also the statement of Representative Celler in the House debates at 103 Congressional Record 16088.

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another provision of the Constitution specifically gives to Congress the power to legislate to secure the right of qualified electors to vote in federal elections (article 1, sec. 2). So, we have here involved the very powers which the Constitution says are not reserved to the states. The action here is not an invasion of state power merely because state voting and registration records are involved. The congressional power is complete in itself and may be exercised to its full extent. The investigation of alleged discriminatory practices is an appropriate step in the process of enforcing and protecting the right of qualified electors [10] to vote. The Act very definitely constitutes appropriate legislation.

THE RULES OF THE COMMISSION

The remaining pertinent and serious questions presented may be thus stated:

(1) Did Congress, in creating the Commission, specifically authorize it to adopt rules for

[10] Under our constitutional system the qualification of voters is a matter committed to the states, subject to federal constitutional restraints prohibiting discrimination on account of race, color, sex, etc. But it is also true that the right of citizens to cast ballots, and have them counted in congressional elections, *in accordance with applicable state laws*, is a right secured by the federal constitution, and this right, unlike those carried by the 14th and 15th Amendments, is secured against the actions of individuals as well as states. Article 1, section 2 of the Constitution, in its provisions for the election of members of the House of Representatives, and the Seventeenth Amendment, in its provision for the election of Senators, provide that officials will be chosen "by the people". Each provision goes on to state that "the Electors in each State shall have the qualifications requisite for Electors of the most numerous branches of the State Legislature." So, while the right of suffrage in federal elections is established in the Constitution, it is subject to the imposition of state standards which are not discriminatory (*Lassiter v. Northhampton Election Bd.*, 360 U.S. 45, decided June 8, 1959.

investigations conducted under Section 104(a)(1) of the Act which would deprive parties investigated of their rights of confrontation and cross-examination and their right to be apprised of the charges against them?[11]

(2) If Congress did so authorize the Commission is such authorization constitutionally permissible?

A careful reading of the several opinions in *Groban*,[12] *Anonymous*,[13] and *Greene*[14] convinces us that, as applied to the circumstances of this case, a serious constitutional issue is presented as to whether or not the rules adopted by this Commission, which deprived these plaintiffs of the right of confrontation and cross-examination and the right to be apprised of the complaints against them, are violative of the

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[11] Congress authorized the Commission to hold hearings (42 U.S.C. 1975 (d)–(f)). Congress enumerated specific mandates with respect to certain less fundamental procedural aspects (42 U.S.C. 1975(a)). Congress did not expressly authorize the Commission to deny to parties investigated the right of apprisal, confrontation, and cross-examination. The Commission assumed that they had the power to so do.

On their own, they adopted a rule denying to the parties investigated the right of cross-examination. The rule is 3(i) and reads as follows:

"Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel."

When informed that a hearing would be held to investigate charges against them, the registrars requested the right to see the accusations and affidavits filed against them. They also specifically requested the names of their accusers. The Commission refused both requests. The denial in each instance was by resolution (see Stipulation).

[12] *In Re Groban*, 352 U.S. 330, 77 S. Ct. 510, decided February 25, 1957.

[13] *Anonymous* v. *Baker*, 360 U.S. 287, June 15, 1959.

[14] *Greene* v. *McElroy*, 360 U.S. 474, decided June 29, 1959.

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Constitution. There is no talismanic formula which can be applied. Every term, the Supreme Court examines the particular circumstances of particular cases in order to apply generalities which no one disputes.

Under the rationale of *Greene,* concurred in by eight justices, a decision is not now required on the constitutionality of these deprivations. It is sufficient that we find there to be nothing in the Act which expressly authorizes or permits the Commission's refusal to inform persons, under investigation for criminal conduct, of the nature, cause and source of the accusations against them, and there is nothing in the act authorizing the Commission to deprive these persons of the right of confrontation and cross-examination.

Here, plaintiffs are being subjected to public opprobrium and scorn without fair and adequate opportunity to disprove the accusations against them. They are being subjected to the distinct likelihood of losing their jobs. They have been charged with, and are under investigation for, criminal conduct, and are to be examined in connection with offenses constituting federal and state crimes [15] in a hearing which would

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[15] The Commission admittedly plans to hold the hearing to investigate written allegations that the registrars deprived certain citizens of their right to vote because of their color, race, religion, or national origin (see Affidavits of Registrars and Stipulation No. 5). Accordingly, it must be admitted that the registrars are being examined in connection with their alleged commission of federal and state crimes, as follows: to-wit:

18 U.S.C.A. 242

"Deprivation of rights under color of law

"Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any

completely fail to comport with traditional American ideas of fair play and would violate every element of natural justice.

The hearing sought to be restrained herein has been called pursuant to, and would be conducted in accordance with, rules which deny the right of confrontation. The registrars would be denied the right of cross-examination. They would be denied the right to be apprised of the identity of the person, or persons, making the charges against them, as well as the exact nature of the charge. These denials are the products of administrative decision not explicitly authorized by Congress. When we consider that this executive commission has been granted the right of subpoena to investigate allegations which, if true, would constitute the commission of crimes under state

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State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

LSA-R.S. 14: 134

"*Malfeasance in office*

"Malfeasance in office is committed when any public officer or public employee shall:

"(1) Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee; or

"(2) Intentionally perform any such duty in an unlawful manner; or

"(3) Knowingly permit any other public officer or public employee, under his authority, to intentionally refuse or fail to perform any duty lawfully required of him, or to perform any such duty in an unlawful manner.

"Whoever commits the crime of malfeasance in office shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both."

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and federal law, and that it is further required to make a report of its findings to the Chief Executive whose duty it is to enforce federal criminal laws,[16] we can reach no other conclusion than to say that if ever the traditional procedural safeguards, spoken of in *Greene,* were required to protect appearers before a commission, then this is the instance. There, the Supreme Court, speaking through its Chief Justice, said:

> Certain principles have remained relatively immutable in our jurisprudence. *One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.* While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e.g., *Mat-*

[16] 42 U.S.C. 1975(c)(b) requires the Commission to submit to the President a final and comprehensive report of its findings. Since the Commission is required to make this report to the President, the Chief Executive Officer of the land, it is fair to presume that a prime purpose of this report is to secure execution and enforcement of the laws presently in effect.

> *tox* v. *United States,* 156 U.S. 237, 242–244; *Kirby* v. *United States,* 174 U.S. 47; *Motes* v. *United States,* 178 U.S. 458, 474; *In re Oliver,* 333 U.S. 257, 273, but also in all types of cases where administrative and regulatory action were under scrutiny. E.g., *Southern R. Co.* v. *Virginia,* 290 U.S. 190; *Ohio Bell Telephone Co.* v. *Commission,* 301 U.S. 292; *Morgan* v. *United States,* 304 U.S. 1, 19; *Carter* v. *Kubler,* 320 U.S. 243; *Reilly* v. *Pinkus,* 338 U.S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-fascist Committee* v. *McGrath,* 341 U.S. 168–169. [Italic ours.]
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>
> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., *The Japanese Immigrant Case,* 189 U.S. 86, 101; *Dismuke* v. *United States,* 297 U.S. 167, 172; *Ex parte Endo,* 323 U.S. 283, 299–300; *American Power Co.* v. *Securities and Exchange Comm'n,* 329 U.S. 90, 107–108; *Hannegan* v. *Esquire,* 327 U.S. 146, 156; *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 49; Cf. *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337; *United States* v. *Rumely,* 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication and without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition.

And Mr. Justice Douglas, concurring in *Peters* v. *Hobby,* 349 U.S. 331, says:

> It, therefore, becomes necessary for me to reach the constitutional issue.

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> Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under *Corss*-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds, or by people who, though sincere, have poor facilities of observation and memory.
>
> Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and the outer darkness, without the rudiments of a fair trial. The practice of using faceless informers has apparently spread through a vast domain. It is used not only to get rid of employees in the Government, but also employees who work for private firms having contracts with the Government. * * *.

The Supreme Court, in *Greene,* clearly and concisely charted a salutary and sensible course to be followed. Whether the procedures under the circumstances here are constitutionally permissible we do not decide. In accordance with the teachings of *Greene,* we decide only that in a hearing such as the one envisaged here, the Commission had no right to deny the accused Registrars the traditional rights of confrontation and cross-examination in the absence of explicit congressional authorization to do so.

In *Greene* the Supreme Court held these safeguards were not to be denied to one being investigated for alleged communistic associations and sympathies in the absence of explicit authorization from either the President or Congress. Surely, duly chosen state officials are entitled to the same protection, especially since no considerations of national security are involved. So is every citizen. In *Greene,* the government did not take the petitioner's job away from him, but he did lose his job as a result of a government finding to the effect that he was not a good security risk. If the Commission here finds the charges against the registrars are true, they are faced not only with public scorn and possible loss of their jobs, but also with probable indictment, arrest and prosecution.

We are impressed, but not persuaded, by the government's argument that the legislative history of the Act proves that the Commission acted at the implied directed of Congress in adopting the rules here under attack. This argument of implied direction cannot be sustained in the face of the following language from *Greene:*

> The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination.
>
> "If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here.

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Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen professions without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. * * * Such decisions cannot be assumed by acquiescence or nonaction. * * * They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized. * * * but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for acting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., *The Japanese Immigrant Case,* 189 U.S. 86, 101; *Dismuke* v. *United States,* 297 U.S. 167, 172; *Ex parte Endo,* 323 U.S. 283, 299–300; *American Power Co.* v. *Securities and Exchange Comm'n,* 329 U.S. 90, 107–108; *Hannegan* v. *Esquire,* 327 U.S. 146, 156; *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 49; C.F. *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337; *United States* v. *Rumely,* 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit

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> action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition.

Moreover, even if we were to ignore *Greene,* which we have no right to do and certainly will not do, we would still reject the government's argument of implication. The rejection by Congress of more extensive rules is neither explicit nor implied authority be eliminate the fundamental safeguards under the circumstances here present. It is true that Congress refused to explicitly provide the safeguards, but it is equally true that there is nothing in the history of this legislation to show *that Congress even considered writing into the Act any power of the Commission to do away with apprisal, confrontation, and cross-examination.* The silence of Congress was apparently the product of thoughtful compromise. Some members of Congress positively wanted the fundamental safeguards spelled out, while others probably would have approved legislation specifically denying the accused these rights. *Congress remained silent.*

In *Greene* the Court specially found that the Defense Department *had been authorized* to fashion and apply an industrial clearance program but that the Department had not shown that either Congress or the President had *explicitly authorized* proceedings in which the accused was not afforded the safeguards of confrontation and cross-examination. In *Greene* the President, in general terms, had authorized the Department of Defense to create procedures to restrict the dissemination of classified information, and had apparently acquiesced in the elaborate program established by the Secretary of Defense which denied investigated parties of the rights of confrontation and cross-examination. The case for authorization there was stronger than here; e.g., in *Greene,*

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Part IV, § 2 of Executive Order 9835 specifically stated:

> * * * the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed * * *

Justice Clark, dissenting, thought the authorization was specific:

> How the Court can say, despite these facts, that the President had not sufficiently authorized the program is beyond me, unless the Court means that it is necessary for the President to write out the Industrial Security Manual in his own hand.

The Supreme Court, by an 8–1 majority, rejected the authorization as being insufficient.[17] We are not free to do otherwise here.

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[17] Equally as decisive on the issue of explicit authorization in areas of doubtful constitutionality is *Kent* v. *Dulles*, 357 U.S. 116. There, Congress had enacted legislation requiring every passport application to "contain a true recital of each and every matter of fact which may be required by any rules" of the Secretary of State, and that requirement had to be satisfied "before a passport is issued to any person." In this context, the Secretary asked for, and petitioners refused to file, the required affidavits stating whether they then were or ever had been members of the Communist party. Thereupon, the Secretary refused to further consider petitioners' application until such time as they filed the required affidavits. The

The conclusion is inevitable here that the burden is upon the government to show the "explicit action" by Congress authorizing the adoption of the rules which refuse to permit cross-examination, confrontation, and apprisal. In this case the government has made no attempt to point to any "explicit action" of authorization. Congress has made no such authorization, and absent such an explicit authorization, the rules in these particulars are clearly ultra vires.

THE EQUITIES

Proper voting practices are the cornerstone upon which our democratic balance is maintained. Discrimination upsets that balance. Moreover, discrimination clearly violates the Constitution. Steps designed to determine whether there has been discrimination are therefore of grave public interest and importance. When there are charges, as there are here, which state that by one means or another the vote is being denied to a qualified person, the public interest will be served by learning all the facts. Certainly, the surest way of finding out all the facts is to hear from everybody, and the surest test of a witness's veracity is his confrontation and cross-examination.

Government counsel seem to say in their briefs that their investigation is so very important that

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scholars, the courts, the Chief Executive, and the Attorney General all agreed that the issuance of passports had for years been a "discretionary act" on the part of the State Department. The Supreme Court decided that in order for the Secretary to deny a passport to a Communist whose travel abroad would be inimical to our national security, Congress must so provide in explicit terms. The Court once again had construed very narrowly the delegated power to curtail or dilute substantial and fundamental rights.

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this Court should not hold that the traditional safeguards should be afforded the registrars. We in no way disagree with counsel for the government concerning the value they place on the precious right to vote. But search as we have, we find nothing inimical to the government's interest in giving to the registrars the rights they insist upon here. The ultimate goal of Congress in creating the Commission was to find out all of the facts—the truth, not just possibly prejudiced opinion—so as to be able to safeguard the free exercise of the voting right, subject to the legitimate power of the state to prescribe nondiscriminatory and fair voting qualifications. Often in cases of this nature the Court must balance between individual and governmental interests. Here, we examine the record for that purpose and find no conflict. No better procedure exists for finding out the truth than to give the accused notice of the case against him and full opportunity to meet it. Hearings so conducted generate a feeling, so vital in a popular government, that justice is being done.

We have dealt at length with the immediate and irreparable damage that would be caused the registrars by forcing them to proceed without giving them their basic and traditional rights. No good purpose would be served by reviewing that phase of the case. Suffice it to say that we stand on what we have said and we agree with Judge Dawkins' original opinion—that these registrars are faced with immediate and irreparable injury. What damage, what injury, will the Commission suffer by giving to these registrars their traditional safeguards of due process of law, and by affording them the tenets of natural justice? In our humble opinion, all the Commission will suffer is perhaps a little inconvenience. It may take them three days rather than one to get the facts. How

best can they perform the major task of "finding out all the facts" than to give the persons investigated the basic legal safeguards. We have searched in vain throughout the extensive briefs filed by the government in an effort to find out what irreparable damage, or what damage at all, could be done the Commission by prohibiting them from holding a hearing pursuant to these "ultra vires" rules and resolutions.

We do find in various parts of the government's briefs several statements or intimations as to damage. It was suggested that irreparable damage will be suffered because the Commission will expire in November. The recent action of Congress in extending the life of the Commission dispels this argument.

The government also suggests that if copies of the accustations and the names of the accusers were furnished the registrars it might result in the accusers being prosecuted for perjury. That is a strong argument—if one person makes a written allegation under oath that another has committed a crime and this oath turns out to be untrue, the public interest does not require that the government protect the perjurer. The government also argues that the Court should take judicial notice of the possible pressure to which persons making complaints in this field are subject under present circumstances. This Court does not know of a single instance where any such pressure has actually been brought. Some honest, sincere, and well-meaning people really believe this, but we are not going to assume (in the total absence of evidence) that the people of this State will be guilty of such a practice. Finally, the government argues that there is no point in telling these people what they did because they are the registrars and they *know* what they did. This contention assumes the registrars' guilt,

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an assumption which itself does violence to the American concept of justice—that all persons accused of crime are presumed to be innocent until proven guilty by competent evidence.

Insofar as the right to cross-examination is concerned, the government offers no reason why this should be denied. They merely say that they do not have to give it because congressional committees do not, and that Congress did not intend them to do it.

The Commission has authority to hold public hearings on vital public issues. Knowledge and understanding of every element of the problem will give greater clarity and perspective to one of the most difficult questions facing our country. Such a study, such an investigation, fairly conducted, will tend to unite responsible people in a common effort to solve these problems. Investigation and hearings will bring into proper focus the areas of responsibility of the federal government and of the states under our constitutional system. Through greater public understanding, therefore, the Commission may chart a course of progress to guide us in the years ahead, but a fact finding investigation conducted as this one is proposed to be conducted can result only in misunderstanding, suspicion, hostility, and unneeded bitterness.

Natural justice would not require confrontation, apprisal, and cross-examination in every hearing of the Commission, but only in instances where, as here, the record makes it abundantly clear that those being investigated are accused and suspected of criminal conduct.

Believing as we do that the procedures and the rules of the Commission in the particulars heretofore discussed are ultra vires and threaten the registrars with immediate and irreparable damage, and believing fur-

ther that the interests of the government, the public, and the Commission will best be served by the holding of a full and fair hearing wherein all accused of crimes are given a fair chance to develop all the facts, we have but one course to take—that is to dismiss the government's motion for summary judgment and grant the prayer for an injunction, in accordance with this opinion.

It is so ordered on this the 6th day of October, 1959.

JOHN MINOR WISDOM, *Circuit Judge* (dissenting).

I concur in the holding that the Act is constitutional and that the Administrative Procedure Act is inapplicable. I feel compelled, however, to dissent from the holding that under *Greene* v. *McElroy* the rules of the Commission are ultra vires.

I

The Commission's rules may be inadequate, in terms of traditional safeguards accorded a defendant in a criminal trial, but they are the rules Congress authorized for hearings by the Civil Rights Commission.

This case differs radically from *Greene* v. *McElroy*. Here, Congress took pains to set out in the Act, in its delegation of authority, mandatory rules of procedure to be followed by the Commission. The Commission's rules folow the language of the statute or are based on the intent of the statute.[1] Thus, on the important issue of the right of cross-examination, the Commission rule provides: "Interrogation of witnesses at hearings shall be conducted only by authorized staff personnel."[2] This is based on the statutory provision, Section 102(c): "Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights." The limitation of the activities of a lawyer

Footnotes on p. 41.

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to giving advice to his client, is just a way of saying that the lawyer (or his client) cannot cross-examine an adverse witness.

A central issue in the controversy over civil rights legislation was whether witnesses should have the traditional safeguards of notice, confrontation, and cross-examination. The 1956 Civil Rights Bill, H.R. 627, as reported by the House Judiciary Committee, contained no special rules of procedure. H. Rep. No. 2187, 84 Cong., 2d Sess. It was amended on the floor of the House by the addition of elaborate safeguards which Representative Dies of Texas proposed. 102 Cong. Rec. 13542, 13548. This amendment required notice of the subject of the inquiry and confrontation, and allowed limited cross-examination. The bill passed the House, but no action was taken on it in the Senate. In 1957 several bills were introduced containing the same procedural provisions as the 1956 bill, as amended. One of these was S. 83, the subject of Senate hearings in 1957.[3] The position of the Department of Justice, as stated by the Attorney General, was that "it would be a mistake to make it the vehicle for experimenting with new rules". Hearings, Senate Judiciary Committee, 85 Cong., 1st Sess., p. 14. In the House hearings on the 1957 Civil Rights proposal Senator, then Representative, Keating asked Attorney General Brownell if the Department would object to the Committee inserting in the bill a provision "similar to those set up in the rules of the House for the conduct of congressional committees". General Brownell stated that the Department had no objection to such rules of procedure. H.R. 6127, adopted into law as the Civil Rights Act of 1957, incorporated the House "Fair Play Rules"[4] as Section 102 of the Act.[5]

The action of Congress in refusing to adopt a particular bill and adoption of another bill is often an unreliable guide to congressional intent. But the circumstances in which H.R. 6127 became law, rather than S. 83 or H.R. 627, make it clear that Congress, after careful deliberation, made a choice of procedures. Congress rejected the traditional safeguards accorded a defendant in a criminal trial and accepted the House "Fair Play Rules".

The House "Fair Play Rules" were drawn for the conduct of congressional investigating committees. They were the indirect product of innumerable legal articles, judicial dicta, and editorials.[6] They were the direct product of careful study.[7] It is safe to say that when the House "Fair Play Rules" were adopted as Section 102 of the Civil Rights Act of 1957 every member of the House and Senate regarded that action as an explicit declaration that Congress affirmatively rejected rules extending to witnesses the rights of notice, confrontation, and cross-examination; that, instead, Congress authorized and directed the Civil Rights Commission to follow its more limited "Fair Play Rules".

This background distinguishes the case from *Greene* v. *McElroy*. There, the majority's reasoning was the President and Congress would not have delegated to the Department of Defense the power to deprive a man of his job as a result of a hearing in which he has no right of confrontation or cross-examination, without including in the delegation express authorization to by-pass the traditional due process safeguards. Here, Congress expressly authorized the by-pass.

II

I therefore reach the issue of the constitutionality of the procedure.

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A hearing subjecting a subpoened witness to public opprobrium, loss of reputation, loss of a job, and possible state and federal prosecution based on testimony brought out at the hearing, carries sanctions no less severe than a criminal trial. Fundamental fairness would seem to require that such a witness have the opportunity to assert the rights of notice, confrontation, cross-examination, and other due process safeguards. No court however has gone that far.

Mr. Justice Clark, the only member of the Supreme Court who reached the constitutional issue in Greene, stated: "[T]he Court has long ago and repeatedly approved administrative action where the right of cross-examination and confrontation were not permitted." Without exception, the courts have drawn a distinction between investigative and adjudicative proceedings. Witnesses in investigative hearings do not have the constitutional rights of a witness in an adjudicative hearing. The Fifth Amendment gives a witness protection in an investigation; the opportunity to assert all due process rights in any later adjudicative proceedings is a sufficient protection.[b]

[b] *In re Groban,* 1957, 352 U.S. 330, 77 S.Ct. 510, 1 L. Ed. 2d 376; *Bowles* v. *Baer,* 7 Cir., 1954, 142 F. 2d 787. *Norwegian Nitrogen Prod. Co.* v. *United States,* 1932, 288 U.S. 294, 53 S.Ct. 350, 77 L. Ed. 796.

In *Groban* a majority of the Supreme Court went very far indeed in denying the right to counsel. An Ohio statute, authorizing the State Fire Marshall to investigate the cause of fires, conferred broad powers on the investigating officer. He could hold the investigation in private, exclude counsel, punish witnesses who refuse to testify by summarily committing them to jail, and, if he believed the evidence would warrant a conviction for arson or a similar crime, he could arrest the witness after the investigation.

The appellants, who were called upon to testify concerning the cause of a fire at their place of business, refused to testify in the absence of counsel. They were committed to jail. In a habeas corpus proceeding, they contended that they had a constitutional right to counsel under the due process clause of the Fourteenth amendment. The court held, five to four, that appellants had no constitutional right to counsel in giving testimony before an investigative body that does not adjudicate legal rights and responsibilities. If Groban was not entitled to due process, no witness is entitled to due process in an investigation.

Taking the law as it is, the Commission's rules are constitutional.

III

The rub in this case comes from the Act itself. It comes from the incongruity of a legislative commission of inquiry investigating specific complaints against individuals accused of crimes.[9] To my mind, the creation of such a commission is of questionable legislative propriety, at best. It carries grave danger of legislative usurpation, at worst.

The investigation of specific violations of the law is for grand juries, not legislative commissions. With all deference to Congress, a commission, constituted to investigate a broad problem of national interest, has no business holding hearings that must inevitably develop into legislative trials of individuals. When a subpoened witness accused of a crime may be subjected to trial by exposure, a fact-finding determination and punishment, he should have the same rights of notice, confrontation, and cross-examination, and all the other hard-earned rights embodied in due process, that any one accused of breaking the law is entitled to when he is tried by a jury before a judge.

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The Commission does not formally adjudicate guilt or impose a formal sentence, but an individual against whom a complaint is made to the Commission may be exposed to all the hardships of a trial and to punishment in many forms.

The House "Fair Play Rules" are a step in the proper direction—for congressional committees. Procedures suitable for Congress' own committees, however, are less than adequate for a trial by an autonomous commission to which Congress has delegated its power of inquiry.

The high purposes animating the creation of the Civil Rights Commission do not diminish the inherent dangers in legislative trials. They simply obscure the dangerous means used to attain the ends of the legislation.

These, however, are considerations for Congress.[10] On the law, unless the minority view in *Groban* should prevail, the Act is constitutional, the rules authorized.

Footnotes

[1] See Appendix A and Appendix B.

[2] This is the rule universally followed by committees of the House and Senate. It permits a form of cross-examination; submission of written questions to be put to the witness by the Chairman—for whatever that is worth as cross-examination.

[3] See Appendix C.

[4] Amendment to Rule XI(25) of the Rules of the House of Representatives. Adopted March 23, 1955, 101 Cong. Rec. 3569–85; House Resolution 151, Rules and Manual, United States House of Representatives, 1959, section 735 (i)–(q).

[5] Section 102(a) through 102(i) of the statute is identical with the House "Fair Play Rules".

[6] For a discussion of the various proposals for a code of procedure before congressional committees, see Maslow, Fair Procedure in Congressional Investigations: A Proposed Code, 54 Cal. L. Rev. 839 (1954). For the code proposed by the American Bar Association, see 40 Am. Bar Ass'n Journ. 900 (1954). See the following, some before and some after adoption of the Fair Play Rules, some

dealing directly with the procedure before congressional committees and some dealing with the rights of witnesses generally in hearings before investigative or administrative bodies; Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 1953 (1926); Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. of Pa. L. Rev. 691 (1926); Herweitz and Mulligan, The Legislative Investigating Committee, 33 Cal. L. Rev. 1 (1933); Morgan, Congressional Investigations and Judicial Review; Kilbourn & Thompson Revisited, 37 Cal. L. Rev. 446 (1949); Davis, The Requirement of Opportunity to be Heard in the Administrative Process, 51 Yale L. Journ. 1091 (1942); Liacos, Rights of Witnesses Before Congressional Committees, 33 Bos. U. L. Rev. 337 (1953); Symposium on Legislative Investigations; Safeguards of Witnesses, 29 Notre Dame Law., 157 (1954); Keating, The Investigating Power of Congress, 14 Fed. Bar Jour. 171 (1954); Kefauver, A Code of Conduct for Congressional Investigations, 8 Ark. L. Rev. 369 (1954); Chase, Improving Congressional Investigations, 30 Temp. L.Q. 126 (1957; Davis, Requirements of a Trial-Type Hearing, 70 Harv. L. Rev. 193 (1956); McKay, The Right of Confrontation, Wash. U. L.Q. 122 (1959). See the following recent notes and comments: Due Process and the Right to Counsel, 33 St. John's L. Rev. 67 (1957); The Civil Rights Act of 1957 and Contempt of Court, 48 Cornell L.Q. 661 (1958); Constitutional Limitations on the Legislative Power of Investigations, 7 Buffalo L. Rev. 267 (1958); Representation by Counsel, 58 Cal. L. Rev. 395 (1958). See also Barth, Government by Investigation (Viking Press, N.Y., 1955) and Taylor, Grand Inquest (Simon & Schuster, N.Y., 1955).

[7] In 1954 both houses of Congress held extensive hearings on the matter of committee procedures. Hearings before the Subcommittee on Legislative Procedure of the House Rules Committee, Legislative Procedure, 83d Cong., 2d Sess. (1954); Hearings before the Subcommittee on Rules of the Senate Rules and Administration Committee, Rules of Procedure for Senate Investigating Committees, 83d Cong., 2d Sess. (1954). See also Report of Senate Committee on Rules and Administration to accompany S. Res. 17, Rules of Procedure for Senate Investigating Committees, 84th Cong., 1955.

[8] Proponents of the legislation emphasized repeatedly; "The Commission created by the proposal is purely investigatory and empowered only to make recommendations". H. Rep. No. 291, 85th Cong., 1st Sess., p. 6.

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[9] Section 104(a)(1) of the Act (Duties of the Commission) provides: "The Commission shall—(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;"

[10] The inclusion in the body of the statute of mandatory rules of procedure is unique in legislation setting up an investigatory commission. This, and the provision requiring application to a court for enforcement of process indicate congressional sensitivity to the problem.

Appendix A

Rules of Procedure of the Commission

Sec. 102. (a) The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

(b) A copy of the Commission's rules shall be made available to the witness before the Commission.

(c) Witnesses at the hearing may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(d) The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings.

(e) If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpoena additional witnesses.

(f) Except as provided in sections 102 and 105(f) of this Act, the Chairman shall receive and the Commission shall dispose of requests to subpena additional witnesses.

(g) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than $1,000, or imprisoned for not more than one year.

(h) In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

(i) Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session, or, if given at an executive session, when authorized by the Commission.

(j) A witness attending any session of the Commission shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $12 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of a subpena issued on behalf of the Commission or any subcommittee thereof.

(k) The Commission shall not issue any subpena for the attendance and testimony of witnesses or for the production of written or other matter which would require the presence of the party subpenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business.

Appendix B

In addition to these statutory provisions, the Commission has adopted the following supplementary Rules of Procedure:

(a) All the provisions of Section 102 of Public Law 85–315, incorporated in Rule 2 above, shall be applicable to and govern the proceedings of all subcommittees appointed by the Commission pursuant to Section 105(f) of Public Law 85–135, incorporated in Rule 1 above.

(b) At least two members of the Commission must be present at any hearing of the Commission or of any subcommittee thereof.

(c) The holding of hearings by the Commission or the appointment of a subcommittee to hold hearings pursuant to the Provisions in Rule 1 above must be approved by a majority of the members of the Commission or by a majority of the mem-

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bers present at which at least a quorum of four members is present.

(d) Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued over the signature of the Chairman of the Commission or by the Chairman upon the request of a member of the Commission.

(e) Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued over signature of the Chairman of a subcommittee appointed pursuant to the provisions of Rule 1 above by the Chairman or by the Chairman upon the request of a member of the subcommittee.

(f) An accurate transcript shall be made of the testimony of all witnesses in all hearings, either public or executive sessions, of the Commission or of any subcommittee thereof. Each witness shall have the right to inspect the record of his own testimony. A transcript copy of his testimony may be purchased by a witness pursuant to Rule 2(i) above. Transcript copies of public sessions may be obtained by the public upon payment of the cost thereof.

(g) Any witness desiring to read a prepared statement in a hearing shall file a copy with the Commission or subcommittee 24 hours in advance. The Commission or subcommittee shall decide whether to permit the reading of such statement.

(h) The Commission or subcommittee shall decide whether written statements or documents submitted to it shall be placed in the record of the hearing.

(i) Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel.

(j) If the Commission pursuant to Rule 2(e), or any subcommittee thereof, determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall advise such person that such evidence has been given and it shall afford such person an opportunity to read the pertinent testimony and to appear as a voluntary witness or to file a sworn statement in his behalf.

(k) Subject to the physical limitations of the hearing room and consideration of the physical comfort of Commission members, staff, and witnesses, equal and reasonable access for cov-

532336—59 —7

erage of the hearings shall be provided to the various means of communications, including newspapers, magazines, radio, news reels, and television. However, no witness shall be televised, filmed or photographed during the hearing if he objects on the ground of distraction, harassment, or physical handicap.

Appendix C (S. 83)

Rights of persons adversely affected by testimony

(q) A person shall be considered to be adversely affected by evidence or testimony of a witness if the Commission determines that; (i) the evidence or testimony would constitute libel or slander if not presented before the Commission or (ii) the evidence or testimony alleges crime or misconduct or tends to disgrace or otherwise to expose the person to public contempt, hatred, or scorn.

(r) Insofar as practicable, any person whose activities are the subject of investigation by the Commission, or about whom adverse information is proposed to be presented at a public hearing of the Commission, shall be fully advised by the Commission as to the matters into which the Commission proposes to inquire and the adverse material which is proposed to be presented. Insofar as practicable, all material reflecting adversely on the character or reputation of any individual which is proposed to be presented at a public hearing of the Commission shall be first reviewed in executive session to determine its reliability and probative value and shall not be presented at a public hearing except pursuant to majority vote of the Commission.

(s) If a person is adversely affected by evidence or testimony given in a public hearing, that person shall have the right; (i) to appear and testify or file a sworn statement in his own behalf, (ii) to have the adverse witness recalled upon application made within thirty days after introduction of such evidence or determination of the adverse witness' testimony, (iii) to be represented by counsel as heretofore provided, (iv) to cross-examine (in person or by counsel) such adverse witness, and (v), subject to the discretion of the Commission, to obtain the issuance by the Commission of subpenas for witnesses, documents, and other evidence in his defense. Such opportunity for rebuttal shall be afforded promptly and, so far as practicable, such hearing shall be conducted at the same place and under

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the same circumstances as the hearing at which adverse testimony was presented.

Cross-examination shall be limited to one hour for each witness, unless the Commission by majority vote extends the time for each witness or group of witnesses.

(t) If a person is adversely affected by evidence or testimony given in executive session or by material in the Commission files or records, and if public release of such evidence, testimony, or material is contemplated, such person shall have, prior to the public release of such evidence *xx* or testimony or material or any disclosure of or comment upon it by members of the Commission or Commission staff or taking of similar evidence or testimony in a public hearing, the rights heretofore conferred and the right to inspect at least as much of the evidence or testimony of the adverse witness or material as will be made public or the subject of a public hearing.

(u) Any witness (except a member of the press who testifies in his professional capacity) who gives testimony before the Commission in an open hearing which reflects adversely on the character or reputation of another person may be required by the Commission to disclose his sources of information, unless to do so would endanger the national security.

APPENDIX B

In the United States District Court for the Western District of Louisiana, Shreveport Division

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[Filed, November 9, 1959]

Civil Action No. 7479

MRS. MARGARET M. LARCHE, ET AL, IN THEIR INDIVIDUAL CAPACITIES AND AS REGISTRARS OF VOTERS IN AND FOR THEIR PARISHES, OF THE STATE OF LOUISIANA *vs.* JOHN A. HANNAH, ET AL., INDIVIDUALLY AND AS MEMBERS OF THE COMMISSION ON CIVIL RIGHTS

Order

For reasons assigned in the Court's written opinion of October 6, 1959,

It is ordered, adjudged and decreed that defendants and their agents, servants, employees and attorneys are enjoined and restrained from conducting the proposed hearing in Shreveport, Louisiana, wherein plaintiff registrars, accused of depriving others of the right to vote, would be denied the right of apprisal, confrontation and cross examination.

This injunction does not prohibit all hearings pursuant to Public Law 85–315, 85th Congress, 42 U.S.C.A. 1975, et seq., but only those hearings proposed to be held in the Western District of Louisiana wherein the accused are denied the right of apprisal, confrontation and cross examination.

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Thus done and signed in Chambers on this the 9 day of November, 1959.

(S) Ben C. Dawkins, Jr.
BEN C. DAWKINS, Jr.,
United States District Judge.

(S) Edwin F. Hunter, Jr.
EDWIN F. HUNTER, Jr.,
United States District Judge.

APPENDIX C

In the United States District Court for the Western District of Louisiana, Shreveport Division

[Filed July 12, 1959]

Civil Action No. 7479

MRS. MARGARET M. LARCHE, ET AL., IN THEIR INDIVIDUAL CAPACITIES AND AS REGISTRARS OF VOTERS IN AND FOR THEIR PARISHES, OF THE STATE OF LOUISIANA *vs.* JOHN A. HANNAH, ET AL., INDIVIDUALLY AND AS MEMBERS OF THE COMMISSION ON CIVIL RIGHTS

Civil Action No. 7480

J. A. H. SLAWSON, ET AL.

vs.

JOHN A. HANNAH, ET AL.

BEN C. DAWKINS, JR., *Chief Judge*

Ruling on applications for temporary restraining orders

We are called upon here to pass tentatively upon one of the burning issues of our time—the propriety and validity of the Rules and Proceedings of the Civil Rights Commission, as established by Congress in September, 1957.[1]

[1] Public Law 85-315, 71 Stat. 634, 42 U.S.C.A. § 1975 a-e.

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That Commission now proposes to hold a hearing, in the Federal Court room at Shreveport, Louisiana, on July 13, 1959, to investigate purported violations of the civil voting rights of some 67 persons, who are said to have filed sworn complaints with the Commission. Pursuant to, and in implementation of, its plans, the Commission has caused subpoenas, and subpoenas duces tecum, to be served upon the plaintiffs in these suits, commanding them to be present and give testimony at the hearing, and requiring the 16 Registrars of Voters, who are plaintiffs [2] in Civil Action No. 7479, to bring with them, for inspection and copying by the Commission, a large number of records from their offices.

These suits, brought against the members of the Commission, and the Commission itself, were filed on July 10, 1959, and are addressed to the equitable powers of this Court.[3] They seek to stay the effectiveness of the Commission's subpoenas and subpoenas duces tecum, and to restrain and enjoin the conduct of the proposed hearing itself,[4] which, plaintiffs aver, under the Rules of Procedure adopted by the Commission, would violate their fundamental constitutional rights and cause them immediate and irreparable damage. Moreover, praying that a three-judge

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[2] These plaintiffs are the duly appointed and constituted Registrars of Voters in the Louisiana Parishes (counties) of Morehouse, Ouachita, Webster, Bossier, Claiborne, Bienville, DeSoto, East Carroll, Madison, Jackson, Red River, Caldwell, Caddo, East Feliciana, West Feliciana, and Washington, all but the last three of which are located in the northern part of the State.

[3] Also alleging jurisdiction in this Court based upon Federal questions, 28 U.S.C.A. § 1331, and Diverse Citizenship, 28 U.S.C.A. § 1332.

[4] Pursuant to 28 U.S.C.A. § 2284(3).

court[5] be convened for that purpose, the Registrar-plaintiffs ask that the Act creating the Commission be declared[6] violative of the Federal Constitution, and thus unenforceable.

Detailing their complaints, supported by sworn affidavits and exhibits attached (and here briefly paraphrased), the Registrar-plaintiffs, in Civil Action No. 7479, allege that between June 29, 1959, and July 6, 1959, each of them were served with subpoenas and subpoenas duces tecum, issued by the Chairman of the Commission, commanding them to appear and testify before the Commission on July 13, 1959, and to bring their records with them; that they have not been informed of the nature of the complaint or complaints against them, nor have they been assured that they will be confronted with the complaining witnesses; that the Commission repeatedly has informed the Attorney General of Louisiana, verbally and in writing,[7] that it would not, under any circumstances, furnish plaintiffs with, or permit them to examine the written complaints filed against them, nor would it divulge the name or names of the secret complainants, all of which is arbitrary and unreasonable, and in violation of plaintiffs' fundamental rights.

They further aver that they, at all times, have complied with the laws of the State of Louisiana, but that the subpoenas served upon them would require them to violate such laws,[8] in that the Registrars'

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[5] 28 U.S.C.A. §§ 2282, 2284.

[6] Under the Declaratory Judgment Statute, 28 U.S.C.A. § 2201, et seq.

[7] The writings are attached to the complaint.

[8] L.S.A.—R.S. 18:169. "*Control and custody of registration books and other records.*

"The books of registration, together with all the records, registry stub books, and all other books and paraphernalia used

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records legally may not be removed from their offices, except "upon an order of a competent court", criminal penalties being provided for violations of these statutes;[9] and that the Commission is not a "competent court". Hence, they say, to comply with the subpoenas, they would be violating the State laws, and subjecting themselves to the penalties thus provided.

These plaintiffs further allege that, attached to the subpoenas served upon them, was a mimeographed document entitled "Rules of Procedure for hearings of the Commission on Civil Rights" in which appears the following: "(1) Interrogation of witnesses shall be conducted only by members of the Commission or by authorized staff personnel"; and that thereby plain-

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for the conduct of the registrar's office, shall at all times be kept under the control of and in the custody of the registrar at his principal office. They shall not be removed therefrom for any purpose except upon an order of a competent court, except the parish register and registration certificate books when these are necessary for the registration of voters, when registration is permitted at places other than at the central office."

L.S.A.—R.S. 18: 251. "*Custody of records.*

"Except as otherwise provided in this Title, the registers, records, files, books, and paraphernalia used for the conduct of the registrar's office shall at all times be kept under the control and in the custody of the registrar at his principal office and shall be removed therefrom only on order of a competent court. Added Acts 1952, No. 415, § 2."

[9] L.S.A.—R.S. 18: 221. "*Violations generally; successive offenses.*

"No person shall violate any provision of this Chapter for which no penalty is specifically provided, or willfully fail or refuse to perform an act or duty required under this Chapter.

"Whoever violates this Section shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned for not less than ninety days nor more than six months. The penalty shall be doubled for the second or any succeeding offense."

532336—59——5

tiffs are deprived of their constitutional right to cross-examine witnesses who may testify against them. They contend that the Commission and its members thus are acting in an *ultra vires* manner in (1) attempting to force plaintiffs to testify at the proposed hearing without first advising them of the nature of the complaint or complaints existing; (2) without allowing plaintiffs to be confronted by the complaining witnesses; (3) not allowing plaintiffs to have counsel empowered to fully represent their interests in such hearing; (4) not allowing cross-examination of the complaining witnesses; and (5) causing irreparable damage to plaintiffs by requiring them to violate the Laws of Louisiana, which would subject them to serious criminal penalties. In their brief, they also urge, as a direct incident of the hearing itself, with unnamed and unknown witnesses testifying against them, not subject to cross-examination by plaintiffs' counsel, that they will be wrongfully accused of violations of both Federal [10] and State [11] laws, without ade-

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[10] 18 U.S.C.A. § 242. "*Deprivation of rights under color of law*

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

42 U.S.C.A. § 1983. "*Civil action for deprivation of rights*

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

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quate opportunity to disprove such accusations, and thus be held up, by the Commission's actions, to public opprobrium and scorn, all to their irreparable injury and damage.

They further contend that the Commission, being an agency of the Executive branch of the Federal Government, is subject to the provisions of the Administrative Procedure Act,[12] and, as such, is required to state explicitly the charges against plaintiffs, to permit them to be confronted with the witnesses against them, and to allow their counsel fully to cross-examine such witnesses. Accordingly, these plaintiffs seek the relief hereinabove outlined.

In general, the plaintiffs in Civil Action No. 7480, who are individual citizens of Louisiana, make the same allegations and contentions as those in No. 7479, except that they have not been called upon to produce any official records. They do not challenge the constitutionality of the Act creating the Commission, but otherwise

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laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979."

[11] L.S.A.—R.S. 14:134. "*Malfeasance in office*

"Malfeasance in office is committed when any public officer or public employee shall:

"(1) Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee; or

"(2) Intentionally perform any such duty in an unlawful manner; or

"(3) Knowingly permit any other public officer or public employee, under his authority, to intentionally refuse or fail to perform any duty lawfully required of him, or to perform any such duty in an unlawful manner.

"Whoever commits the crime of malfeasance in office shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both."

And see L.S.A.—R.S. 18:221, fn. 9.

[12] 5 U.S.C.A. §§ 1001, et seq.

their prayer for relief is substantially similar to that in No. 7479.

Several days prior to July 10, 1959, we were advised by plaintiffs' counsel that they would file these suits on the date indicated. While, as a general rule, applications for temporary restraining orders are considered *ex parte,* solely on the face of the verified complaint and any attached documents, because of the national importance of the matters involved, we immediately notified counsel for the Commission, and its Vice-Chairman, Honorable Robert G. Storey (a personal friend of the Court's, of long standing) of our information, and invited them to be present for a hearing on the applications. The suits were filed at 1:30 P.M. on July 10, and at 2:00 P.M., in open Court, these gentlemen, and counsel for plaintiffs, being present, we convened Court, but immediately recessed in order to give the Commission's representatives opportunity to study the complaints and briefs filed by plaintiffs. At 3:30 P.M., we reconvened and heard oral arguments, from both sides, until 5:20 P.M., at which time the matter of the restraining orders was submitted for decision on the oral arguments and briefs filed by the proponents and opponents of the applications. We have considered the able arguments, studied the respective briefs and authorities cited, and now proceed to our ruling. Necessarily, because of the time element, we have been compelled, under great pressure, to consider the questions rather hastily; and we reserve the right to alter our views, if necessary, after more mature deliberation.

The Court has jurisdiction. 28 U.S.C.A. §§ 1331, 1332, 2201, 2282, 2284. *Jones* v. *Securities Commission,* 298 U.S. 1, 56 S. Ct. 654, 80 L. Ed 1015.

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We are not strongly impressed with the Registrar-plaintiffs' contention that the subpoenas duces tecum, if complied with, would subject them to criminal penalties under Louisiana law. Literally, of course, if they directly complied without more, they are correct in their understanding of the State law. Practically, however, another and different aspect is presented, for under the Civil Rights Commission Act they can refuse to produce the records, without penalties of any kind, and the only recourse the Commission would have would be to request the Attorney General of the United States to apply to this Court, under 42 U.S.C.A. § 1975d(g)[13] for an order requiring their production. Plaintiffs then would be protected against State prosecution by the very terms of LSA–R.S. 18:236,[14] as well as by LSA–R.S. 18:169 (see

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[13] "*Aid of courts in enforcing subpoenas*

"(g) In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee thereof, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof. Pub. L. 85–315, Part I, § 105, Sept. 9, 1957, 71 Stat. 636."

[14] "§ 236. *Alteration, defacing, destruction or removal of records; penalty*

"No registrar, deputy, clerk, or employee of any registrar, or any person having, or having been given access to, or right of inspection, copying or photographing of any book, card, record, or other document pertaining to the registration of voters, shall

fn. 8), for this Court clearly is a "competent court", within the meaning of those Statutes.

Likewise, plaintiffs would suffer no immediate federal penalties under the Act for refusal either to appear or to testify, but would be subject to an enforcement order from this Court, which would see to it that their constitutional rights against self-incrimination are adequately protected. Moreover, under the Act, since their counsel are entitled to be present, they could be advised, at each step of the proceedings, whether to claim the protection of the Fifth Amendment, even though, in this day, the general public has come to consider such a claim as tantamount to a plea of guilty, particularly in response to "loaded" questions.

We are strongly of the opinion, however, that plaintiffs' remaining grounds for immediate relief are well taken:

First, it appears rather clear, at this juncture, that the Civil Rights Commission is an "agency" of the Executive branch of the United States, within the meaning of that term as defined at 5 U.S.C.A. § 1001

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illegally or improperly alter, add to, deface, destroy, or remove same from the custody of the registrar.

"Whoever violates this Section shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned for not less than sixty days nor more than two years. However, nothing in this Section prevents a competent court from requiring, by proper order, the production by the registrar in court, in any proceeding pending there in, of any document, book, card, or record necessary and material, in the opinion of the court, to the determination of the proceeding; such documents do not become permanent records of the court, but shall be returned to the custody of the registrar immediately after inspection by the court. The court may require a photostatic copy thereof to be placed in the record. Added Acts 1952, No. 415, § 2."

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(a).[15] See also 42 U.S.C.A. § 1975(a).[16] It performs quasi-judicial functions in its hearings, its fact findings, its studies of "legal developments constituting a denial of equal protection of the laws under the Constitution", and its appraisal of "the laws and policies of the Federal Government" in the same respect.[17] It

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[15] "(a) 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States, other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 1002 of this title, there shall be excluded from the operation of this chapter (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, * * *."

[16] "§ 1975. *Commission on Civil Rights—Establishment*

"(a) There is created in the *executive branch* of the Government a Commission on Civil Rights (hereinafter called the 'Commission')." [Emphasis supplied.]

[17] 42 U.S.C.A. § 1975c. "*Duties; reports; termination*

"(a) The Commission shall—

"(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;

"(2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and

"(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

"adjudicates" by its rulings upon the admissibility of evidence at its hearings and by its determinations of what is or is not the truth in matters before it. Thus we think that the Commission is subject to the provisions of section 4 of the Administrative Procedure Act,[18] which requires, among other things that persons affected by agency action "* * * shall be timely informed of the matters of fact and law asserted." Here that would encompass the *nature* of the charges filed against plaintiffs, as well as the matters of fact and law wherein the complainants' voting rights allegedly have been violated. The Commission also is subject to section 6 which would require it to grant plaintiffs the right "to conduct such cross-examination as may be required for a full and true disclosure of the facts.[19] This, by its Rules, the Commission refuses

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"(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from September 9, 1957."

[18] 5 U.S.C.A. § 1004. "*Adjudications*

* * * * *

"(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) *the matters of fact and law asserted.* * * *" [Emphasis supplied.]

[19] U.S.C.A. § 1006. "*Hearings, presiding officers; powers and duties; burden of proof; evidence; record as basis for decision*

* * * * *

"(c) * * * Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *"

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to do, and in so doing, regardless of its well intentioned motives, it violates the terms of that Act. Plaintiffs are entitled, therefore, to protection against these Rules, which would deprive them of their plain rights under the Act.

Second, while the statute creating the Commission inferentially permits it to adopt reasonable Rules, 42 U.S.C.A. § 1975(b), there is no provision whatsoever in the law to the effect that such Rules may include those here complained of, which plainly violate plaintiff's basic rights to know in advance with what they are charged, to be confronted by the witnesses against them, [20] and to cross-examine their accusers. We cannot believe that Congress intended to deny these fundamental rights to anyone, and because of such belief it is our opinion that these Rules of the Commission are *ultra vires* and unenforceable. Therefore, plaintiffs are entitled to immediate relief against them.

Third, entirely aside from the statutory questions just discussed, the Courts of the United States, and their Anglo-Saxon predecessors, always have seen to it that, in hearings or trials of all kinds, persons accused of violating laws must be adequately advised of the charges against them, confronted by their accusers, and permitted to search for the truth through thorough cross-examination. In *Jones* v. *Securities Commission,* 298 U.S. 1, 27, 57 S. Ct. 654, 80 L. Ed. 1015, the Supreme Court said:

> * * * "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by

[20] 42 U.S.C.A. § 1975a(g) inferentially authorizes the Commission to sit in executive or closed session. Apparently pursuant to this, the Commission's Rules 2 (e) and (g) were adopted. They do not guaranteee, or apparently even permit, the person accused at such an executive session to be present to confront the witness or witnesses against him.

> a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end."
>
> The fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious. * * *
>
> The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. *An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing to light.* * * * [Emphasis supplied.]

In *Morgan, et al.*, v. *United States, et al.*, 304 U.S. 1, 14, 20, 25, 58 S. Ct. 773, 82 L. Ed. 1129, involving an administrative hearing, the Court said:

> The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence

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> to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard." * * *
>
> * * * * *
>
> The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. * * *
>
> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. * * *"

In the most recent decision on this subject, handed down by the Supreme Court on June 29, 1959, *Greene* v. *McElroy*, No. 180, October 1958 Term, — U.S. —, — S. Ct. —, — L. Ed. —, 29 L.W. 4528, 4534, 4538, and speaking through Chief Justice Warren, the following language is found:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an op-

portunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, *e.g., Mattox* v. *United States,* 156 U.S. 237, 242–244; *Kirby* v. *United States,* 174 U.S. 47; *Motes* v. *United States,* 178 U.S. 458, 474; *In re Oliver,* 333 U.S. 257, 273, but also in all types of cases where administrative and regulatory action were under scrutiny. *E.g., Southern R. Co.* v. *Virginia,* 290 U.S. 190; *Ohio Bell Telephone Co.* v. *Commission,* 301 U.S. 292; *Morgan* v. *United States,* 304 U.S. 1, 19; *Carter* v. *Kubler,* 320 U.S. 243; *Reilly* v. *Pinkus,* 338 U.S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-fascist Committee* v. *McGrath,* 341 U.S. 168–169 (concurring opinion).

Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:

"For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction

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that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, *e.g.*, *The Japanese Immigrant Case,* 189 U.S. 86, 101; *Dismuke* v. *United States,* 297 U.S. 167, 172; *Ex parte Endo,* 323 U.S. 283, 299–300; *American Power Co.* v. *Securities and Exchange Comm'n,* 329 U.S. 90, 107–108; *Hannegan* v. *Esquire,* 327 U.S. 146, 156; *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 49. *Cf. Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337; *United States* v. *Rumely,* 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication and without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition.

These authorities, therefore, clearly establish additional reasons why plaintiffs should be granted immediate relief.

Fourth, there is every reason to believe, considering that the Commission has announced its receipt of complaints from some 67 persons, that those persons will testify that plaintiffs have violated either the State or Federal laws, or both. Plaintiffs thus will be condemned out of the mouths of these witnesses, and plaintiffs' testimony alone, without having the right to cross-examine and thereby to test the truth of such assertions, may not be adequate to meet or overcome the charges, thus permitting plaintiffs to be stigmatized and held up, before the eyes of the nation to opprobrium and scorn. Moreover, not knowing in

advance the exact nature of the charges to be made against them, some of the plaintiffs, whose official domiciles are at varying distances up to 250 miles from Shreveport, may not be able physically to obtain the presence of witnesses of their own, who might negative or disprove the claims of the complaining witnesses, especially since the Commission has announced that its hearing will last only one day.

These are further solid reasons, showing possible or probable irreparable injury to plaintiffs, which justify their being granted immediate relief.

Fifth, and finally, plaintiffs raised very serious questions regarding the validity—the constitutionality—of the very Act which created the Commission. We do not intimate here any opinion as to the constitutionality of the Statute, for that is a matter to be decided by the three-judge court to be convened by the Chief Judge of this Circuit. However, the seriousness of the attack must be noted, in considering whether a temporary restraining order should be issued, to stay the effectiveness of the Statute until its validity *vel non* can be determined by the three-judge court after hearing on plaintiffs' application for an interlocutory injunction. See *Ohio Oil Co.* v. *Conway,* 279 U.S. 813, 49 S. Ct. 256, 73 L. Ed. 972, where the Supreme Court stated, in a *per curiam* opinion:

> The application for an interlocutory injunction was submitted on ex parte affidavits which are harmonious in some particulars and contradictory in other. The affidavits, especially those for the defendant, are open to the criticism that on some points mere conclusions are given instead of primary facts. But enough appears to make it plain that there is a real dispute over material questions of fact which cannot be satisfactorily resolved upon the

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present affidavits and yet must be resolved before the constitutional validity of the amendatory statute can be determined.

* * * * *

Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. *Love* v. *Atchison, Topeka & Santa Fe R. Co.,* 185 Fed. 321, 331–332.

In *Crockett* v. *Hortman,* 101 F. Supp. 111, 115, at page 115, Judge Wright, of the Eastern District of Louisiana, dealing with the constitutionality of a State statute, said:

Where as here the questions presented by an application for a temporary injunction are grave, and the injury to the moving parties will be certain and irreparable if the application be denied and the final decree be in their favor, while if the injunction be granted the injury to opposing parties, even if the final decree be in their favor, will be inconsiderable, the injunction should be granted. *Ohio Oil Co.* v. *Conway,* 279 U.S. 813, 49 S. Ct. 256, 73 L. Ed. 972.

The determination of the grave constitutional issues presented in this case should not be decided without a trial on the merits, *Polk Co.* v. *Glover,* 305 U.S. 5, 59 S. Ct. 15, 83 L. Ed. 6, and a temporary injunction should be issued in order that the status quo may be preserved until that time.

To the same effect, see also *Burton, et al.* v. *Matanuska Valley Lines, Inc.,* 244 F. 2d 647.

This, then, is another ground upon which plaintiffs are entitled to the immediate relief they seek.

For these reasons,[21] the applications for temporary restraining orders will be GRANTED.

Thus done and signed, in Chambers, at Shreveport, Louisiana, on this the 12th day of July, 1959.

———— ————,

United States District Judge.

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[21] Nothing that we have said, in ruling upon these cases, is intended in any way to reflect upon the Commission, its members or its staff, all of whom, we are sure, are honorable gentlemen.

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